Ahmad Ziyad bin Elias & Ors v Suruhanjaya Sekuriti Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–69–04 OF 2016
HANIPAH FARIKULLAH J
15 JULY 2016

Civil Procedure — Judicial review — Application for leave — Applicants as shareholders of company sought for leave to quash decision of first respondent in a letter issued by principle adviser for acquisition of assets of company — Whether letter was first respondent's decision — Whether letter amounted to decision — Whether applicants had locus standi to file application — Whether domestic remedy provided under s 364 of the Capital Markets and Services Act 2007 exhausted — Capital Markets and Services Act 2007 s 364

The five applicants ('the applicants') were shareholders of Best Oracle Sdn Bhd ('Best Oracle') which held 20% of shares in an acquisition company known as CLIQ Energy Bhd ('CLIQ'). In the present action, the applicants sought for leave to quash the decision of the Security Commission of Malaysia ('the first respondent') in a letter dated 7 January 2016 ('the said letter') issued by MIB. MIB was appointed by CLIQ as the principal adviser for acquisition of assets known as Karazhanbas Northern Field in Kazakhstan. In the said letter, the first respondent had inquired whether Deloitte Corporate Advisory Services Sdn Bhd ('Deloitte') had undertaken the independent technical review of the reserve assessment report and revised asset valuation report ('the said reports') prepared by AGR-TRACS ('AGR'), an independent technical and valuation expert. In response to the applicants' application, the first respondent raised three grounds of objection: (a) the decision complained of was not a decision; (b) the applicants had no locus standi to file the application; and (c) the domestic remedy ie the appeal mechanism provided under s 364 of the Capital Markets and Services Act 2007 ('the Act') had not been exhausted.

Held, dismissing the application:

(1) It was not a disputed fact that MIB was the principal advisor of CLIQ and all communication between the applicants and the first respondent were made through MIB in such capacity. The documentary evidence clearly showed that the first respondent did not deal directly with the applicants but communicated at all material times through MIB as principal adviser. Hence, the fact that the said letter was not a letter from the first respondent was of no relevance because the first respondent's

instructions and/or queries were carried through, at all material times, to the applicants through MIB as the principal adviser (see paras 14–15). A

(2) The email dated 20 January 2016 from CLIQ to Deloitte showed that the meaning of 'negative assurance' discussed in the meeting held between MIB and the first respondent on 15 January 2016 was a requirement that Deloitte had to undertake an independent technical review of the said reports. The independent technical review by Deloitte over the said reports surfaced for the first time in the said letter from MIB, in the form of a query from the first respondent whether Deloitte had undertaken such a review. Therefore, there was a 'decision' by the first respondent vide the said letter for Deloitte to produce an independent technical assessment of the said reports (see paras 24–25). B C

(3) The applicants had the locus standi to bring the present action against the first respondent on the ground that they had a direct financial interest as shareholders of Best Oracle, which in turn held 20% of shares in CLIQ (see para 31). D

(4) Based on the facts of the case, the appeal mechanism under s 364 of the Act had not been availed by the applicants. In fact, the applicants did not provide any reason why it had not resorted to the statutory mechanism under s 364 of the Act. The proper time at which the applicants should seek to apply for judicial review was after the exhaustion of the statutory review procedure in pursuant to s 364 of the Act (see paras 38 & 41). E

[Bahasa Malaysia summary F

Kelima-lima pemohon ('pemohon-pemohon') adalah pemegang saham Best Oracle Sdn Bhd ('Best Oracle') yang memegang sebanyak 20% saham dalam syarikat yang diambilalih dikenali sebagai CLIQ Energy Bhd ('CLIQ'). Dalam tindakan ini, pemohon-pemohon memohon untuk izin bagi membatalkan keputusan Suruhanjaya Sekuriti Malaysia ('responden pertama') di dalam surat bertarikh 7 Januari 2016 ('surat tersebut') dikeluarkan oleh MIB. MIB dilantik oleh CLIQ sebagai penasihat utama bagi pengambilan aset yang dikenali sebagai Karazhanbas Northern Field di Kazakhstan. Di dalam surat tersebut, responden pertama bertanya sama ada Deloitte Corporate Advisory Services Sdn Bhd ('Deloitte') telah mengambil alih kajian semula teknikal bebas terhadap laporan penilaian rizab dan laporan kajian semula penilaian aset ('laporan-laporan tersebut') yang disediakan oleh AGR-TRACS ('AGR'), pakar teknikal dan penilaian bebas. Dalam menjawab kepada permohonan pemohon-pemohon, responden pertama membangkitkan tiga alasan bantahan: (a) keputusan yang diadukan bukan keputusan; (b) pemohon-pemohon tidak mempunyai locus standi untuk memfailkan permohonan; dan (c) remedi domestik iaitu mekanisme rayuan yang diperuntukkan di bawah s 364 Akta Pasaran Modal dan Perkhidmatan 2007 ('Akta') tidak digunakan. G H I

Diputuskan, menolak permohonan:

(1) Ia adalah fakta yang tidak dipertikaikan bahawa MIB adalah penasihat utama CLIQ dan kesemua komunikasi di antara pemohon-pemohon dan responden pertama dibuat melalui MIB dalam kapasiti sedemikian. Keterangan dokumentari jelas menunjukkan bahawa responden pertama tidak berurusan secara langsung dengan pemohon-pemohon tetapi berkomunikasi pada kesemua masa material melalui MIB sebagai penasihat utama. Maka, fakta bahawa surat tersebut bukan surat daripada responden pertama tidak relevan kerana arahan-arahan dan/atau pertanyaan responden pertama dijalankan, pada kesemua masa material, kepada pemohon-pemohon melalui MIB sebagai penasihat utama (lihat perenggan 14–15).

(2) Emel bertarikh 20 Januari 2016 daripada CLIQ kepada Deloitte menunjukkan bahawa maksud 'negative assurance' yang dibincangkan dalam mesyuarat yang diadakan di antara MIB dan responden pertama pada 15 Januari 2016 adalah keperluan bahawa Deloitte perlu mengambil alih kajian semula teknikal bebas laporan-laporan tersebut. kajian semula teknikal bebas oleh Deloitte terhadap laporan-laporan tersebut timbul buat kali pertama di dalam surat tersebut daripada MIB, dalam bentuk pertanyaan daripada responden pertama sama ada Deloitte telah mengambil alih kajian semula tersebut. Oleh itu, terdapat 'decision' oleh responden pertama melalui surat tersebut untuk Deloitte mengemukakan penilaian teknikal bebas laporan-laporan tersebut (lihat perenggan 24–25).

(3) Pemohon-pemohon mempunyai locus standi untuk membawa tindakan ini terhadap responden pertama atas alasan bahawa mereka mempunyai kepentingan kewangan langsung sebagai pemegang saham Best Oracle, yang mana sebaliknya memegang sebanyak 20% saham dalam CLIQ (lihat perenggan 31).

(4) Berdasarkan fakta kes, mekanisme rayuan di bawah s 364 Akta tidak digunakan oleh pemohon-pemohon. Sebenarnya, pemohon-pemohon tidak memberikan apa-apa alasan mengapa ia tidak merujuk kepada mekanisme statutori di bawah s 364 Akta. Masa yang betul di mana pemohon-pemohon patut memohon untuk semakan kehakiman adalah selepas penggunaan prosedur semakan statutori berikutan s 364 Akta (lihat perenggan 38 & 41).]

Notes

For cases on application for leave, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5950–5953.

Cases referred to

Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor [2008] 6 MLJ 704, CA (refd)
Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145; [2010] 5 CLJ 865, FC (refd)
Government of Malaysia v Lim Kit Siang United Engineers (M) Berhad v Lim Kit Siang [1988] 2 MLJ 12, FC (refd)
Kerajaan Negeri Selangor & Ors v Pendaftar Pertubuhan Malaysia and another suit [2012] 3 MLJ 795, HC (refd)
M & W Zander Sdn Bhd v Director General of Inland Revenue [2005] MLJU 669; [2005] 6 CLJ 336, HC (refd)
Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor [2014] 3 MLJ 145, FC (refd)
Mohd Karim bin Abas & Ors v Ketua Pengarah Jabatan Hal Ehwal Kesatuan Sekerja [2013] 4 MLJ 420, CA (refd)
R (on the application of The London Borough of Lambeth) v The Secretary of State for Work and Pensions [2005] EWHC 637, QBD (refd)
Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan [1987] 2 MLJ 346, SC (refd)
Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177, FC (refd)
Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd [2002] 2 MLJ 707, CA (refd)
Wee Choo Keong v Ketua Pengarah Perkhidmatan Awam [2010] MLJU 1097, HC (refd)

Legislation referred to

Capital Markets and Services Act 2007 ss 2, 364
Securities Commission Act 1993 ss 3, 4

Kamarul Hisham Kamaruddin (Mohd Ruzaini Zulkifli with him) (The Chambers of Kamarul Hisham & Hasnal Rezua) for the applicants.
Lambert Rasa-Ratnam (SM Shanmugam and Joanna D' Silva with him) (Lee Hishammuddin Allen & Gledhill) for the first respondent.
Wan Hazlin Suraya bt Wan Sharif (Federal Counsel, Attorney General's Chambers) for the second respondent.

Hanipah Farikullah J:

INTRODUCTION

[1] The applicants sought in this proceeding for leave to quash the decision of the first respondent, Security Commission of Malaysia ('SC') in a letter dated 7 January 2016.

[2] The five applicants are shareholders of Best Oracle Sdn Bhd ('Best

A Oracle'). Best Oracle owns 20% of the issued and paid-up capital of CLIQ Energy Bhd ('CLIQ'). CLIQ is a special purpose acquisition company. The applicants claimed that they are the management team of CLIQ.

THE APPLICANT'S CASE

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[3] The applicants' case are as follows:

(a) on 10 April 2013, CLIQ was listed on Bursa Malaysia. In accordance with the Equity Guidelines, CLIQ was therefore required to complete a
C qualifying asset by 9 April 2016;

(b) in or around February 2015, CLIQ identified a qualifying asset known as Karazhanbas Northern Field in Kazakhstan ('Kazakhstan asset');

(c) CLIQ appointed for the proposed acquisition of the Kazakhstan asset:

D (i) MIB as its principal adviser;

(ii) AGR-TRACS ('AGR') as the independent technical and valuation expert. AGR prepared the reserve agreement report and the asset valuation report ('AGR reports');

E (iii) Deloitte Corporate Advisory Services Sdn Bhd ('Deloitte') to prepare the 'Fairness report' pursuant to the Bursa Securities Main Market Listing Requirements;

(d) CLIQ through MIB made two submissions to the Commission in
F respect of the proposed acquisition of the Kazakhstan asset.

THE FIRST SUBMISSION TO SC

[4] On 31 July 2015, CLIQ via MIB sent their first submission dated 31 July
G 2015 to SC for the proposed acquisition of the Kazakhstan asset.

[5] SC raised several queries on the proposed acquisition of the Kazakhstan asset after receipt of the first submission.

H THE SECOND SUBMISSION

[6] On 14 December 2015, CLIQ via MIB submitted a revised submission ('the second submission').

I **[7]** SC still had concerns and sought clarifications from MIB on various matters, including the technical information and data relied on relating to the Kazakhstan asset.

[8] MIB issued a letter dated 7 January 2016 to CLIQ advising them on the

steps they should take in regard on their submission on the proposed acquisition of the Kazakhstan asset ('MIB letter').

[9] The applicants contended that the context of the letter dated 7 January 2016 reveals that MIB was communicating the instructions of SC to the applicants on the following:

(a) 2P reserves estimate:

> The SC has further queried on whether the 2P Reserve Estimates comply with the guidelines

(b) fairness report by Deloitte Corporate Advisory:

> The SC has queried on whether Deloitte Corporate Advisory has reviewed AGR-TRACS Reserve Assessment Report and Revised Asset Valuation Report ...;

[10] In response to SC's instructions, MIB specifically advised the board of directors of R2 on the specific steps to be undertaken, namely, inter alia, 'to appoint Deloitte Corporate Advisory to update the Fairness Report after having reviewed the AGR reports and confirms that nothing has come to its attention and they are satisfied with all information provided to them including assumptions made in the AGR reports'.

SC'S OBJECTION

[11] Learned counsel for SC raised his objection to the applicant's application under three headings:

(a) the decision complained of is not a decision;

(b) the applicants have no locus to file the application; and

(c) domestic remedy has not been exhausted.

WHETHER THE LETTER DATED 7 JANUARY 2016 IS SC'S DECISION

[12] It was contended for SC that the decision complained of by the applicants vide MIB's letter dated 7 January 2016 is not a 'decision' by the SC and hence it is not amenable to judicial review. In support of SC's contention, learned counsel relied on the following grounds:

(a) MIB's letter was not issued by SC; and

(b) on the plain reading of the MIB letter, it was merely MIB's advice to CLIQ on the steps they should take in regard to their submission on the proposed acquisition of the Kazakhstan asset.

[13] In support of SC's objection, learned counsel for SC referred me to a number of authorities:

(a) in *Mohd Karim bin Abas & Ors v Ketua Pengarah Jabatan Hal Ehwal Kesatuan Sekerja* [2013] 4 MLJ 420, the Court of Appeal affirmed the High Court's decision refusing leave to apply for judicial review. The main issue in that case was whether the letter from the relevant authority (stating that the decision to register the union as an in house union is to be deferred) amounted to a decision that was amenable to judicial review. The Court of Appeal held:

> The court's themselves have placed various restrictions to control exodus of complaints against public bodies by busy bodies and alike, or where the complaint is premature or trivial or misconceived as in the instant case ... The instant case is one which will fall within jurisprudence of frivolous, vexatious and abuse of process of court, for in the instant case: (a) no decision has been made; (b) the applicants have not demonstrated in the affidavit of the prejudice for failure to have the decision made promptly; and (c) no reason given why appeal mechanism provided under the Act has not been complied with.

(b) in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145; [2010] 5 CLJ 865, the Federal Court held:

> It is widely accepted that not every decision made by an authoritative body is suitable for judicial review. To qualify there must be a sufficient public law element in the decision made. For this, it is necessary to examine both the source of the power and the nature of the decision made; whether the decision was made under a statutory power.

(c) in *Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor* [2008] 6 MLJ 704, the Court of Appeal held:

> It is thus crucial to first identify definitely what the decision is that is sought to be impugned. This has to be the actual date (see *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1). The appellants' interpretation towards the first respondent's non-response to their letter makes no sense and far stretching one's imagination. This would give rise to an artificial meaning to the word decision. The date of the decision too becomes fictitious which makes the computation of the statutory time limit under O 53 of the RHC indeterminable.

(d) in *M & W Zander Sdn Bhd v Director General of Inland Revenue* [2005] MLJU 669; [2005] 6 CLJ 336, the High Court held:

> I must at once say that I do not agree with these arguments. With reference to Mr Lau's first, second and third arguments which concern a matter of interpretation, I agree with him that O 53 should not be read in such a way

> as to deprive it of its vitality and flexibility as a remedy, but on the facts of this case it would be wrong to give the word 'decision', such a tortured or artificial meaning just so that a factual situation which clearly cannot, by any stretch of the imagination, be described as a decision, is in fact regarded as one. The court would clearly be in danger of doing just that here if it accedes to Mr Lau's contention that a mere indication by officers to the Inland Revenue Board as to how they compute the applicant's chargeable income constitutes a decision in the sense of an assessment made by the Director General of the tax payable by the applicant.
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> ...
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> For the reasons above, I agree with learned senior federal counsel that in the absence of a decision by the Director General, the applicant not only lacks a sufficient interest or locus standi to make this application, but that its application is premature in the circumstances.
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> ...
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> Far from being a mere technicality, the requirement for there to be a decision or at the very least a sub-decision of some sort or the lack of it, or of an existing right or status of some sort which is being denied or threatened, is a matter that goes to the very foundation or basis of the application for judicial review under O 53 and so cannot be considered as a mere technicality.

[14] It is not a disputed fact that MIB is the principal advisor of CLIQ and all communication between the applicants and SC were made through MIB in such capacity. The documentary evidence clearly shows that SC does not deal directly with the applicants but communicated at all material times through MIB as principal advisor as can be seen from the following evidence:

(a) the context of the letter dated 7 January 2016 reveals that MIB was communicating the instructions of SC to the applicants, on the following:

(i) 2P reserves estimate:

> The SC has further queried on whether the 2P Reserve Estimates comply with the guidelines ...;

(ii) fairness report by Deloitte Corporate Advisory:

> The SC has queried on whether Deloitte Corporate Advisory has reviewed AGR-TRACS Reserve Assessment Report and Revised Asset Valuation Report ...;

(b) in response to SC's instructions, MIB specifically advised the Board of Directors of R2 on the specific steps to be undertaken, namely, inter alia, 'to appoint Deloitte Corporate Advisory to update the Fairness Report after having reviewed the AGR reports and confirms that nothing has

A come to its attention and they are satisfied with all information provided to them including assumptions made in the AGR reports';

(c) MIB, at all material times, carried the instructions of SC to the applicants as evidenced by:

B (i) in the letter dated 15 January 2016, MIB which states that 'In connection therewith, we wish to advise the Board of Directors of CLIQ, that at the meeting, the SC has advised that the application is deemed incomplete in view of the information which has yet to be submitted to the SC ...';

C (ii) in the letter dated 15 January 2016, MIB stated 'In addition, the SC also reiterated that the deadline to submit the abovementioned information remains as 22 January 2016 ...';

(iii) in the email dated 19 January 2016, MIB informed Deloitte that D SC still insisted on Deloitte's completion of an independent technical assessment of AGR-TRACS' reports before giving a negative assurance to R1, if at all; and

(iv) in response to R2's email to Deloitte dated 20 January 2016, of E which MIB was sent a copy, MIB stated that 'We wish to highlight that during our meeting with the SC together with Skrine on 15 January 2016 it was reiterated that the updated Fairness Report should include an Independent Technical Review by Deloitte of the AGR reports';

F (d) in an email from SC dated 26 January 2016, SC responded to a letter dated 23 January 2016 and an email dated 25 January 2016 sent directly by the applicants to SC appealing, inter alia, for SC to accept the second application (14 December 2015 application) because there was difficulty, in a short period of time, for Deloitte to produce the independent G technical report as requested by SC. SC stated that the applicants must communicate through their principal advisers, namely MIB.

[15] Hence, I accept the applicants' submission that the fact that the letter dated 7 January 2016 was not a letter from SC is of no relevance because *SC's instructions and/or queries are carried through, at all material times, to the applicants through MIB as the principal adviser*. H

WHETHER THE LETTER DATED 7 NOVEMBER 2016 AMOUNTS TO A DECISION

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[16] It was further submitted for SC that the MIB letter was merely *MIB's advice to CLIQ and is not a decision*. On the contrary, learned counsel for the applicants submitted that whether any decision has been made that is susceptible to judicial review must be seen in the context of the whole case as

pleaded. In support of his contention, learned counsel relied on the case of *Wee Choo Keong v Ketua Pengarah Perkhidmatan Awam* [2010] MLJU 1097 and *R (on the application of The London Borough of Lambeth) v The Secretary of State for Work and Pensions* [2005] EWHC 637.

[17] Learned counsel for the applicants further submitted that if this court were to find that the letter dated 7 January 2016 was an informal expression of query, it became later a 'decision' that is susceptible to judicial review.

[18] In support of his contention, learned counsel for the applicants relied on the following opinion in *De Smith's Judicial Review* (6th Ed) (pp 122–123):

> First, there are situations where a public authority seeks to deal with a problem by informal action outside the expected statutory procedures or in the absence of any statutory regime. It is submitted that where a public authority takes such action to further its public functions, this should, in principle, be reviewable.

[19] I consider that the approach adopted by the learned counsel for the applicants in relation to the meaning of 'decision' is correct in the context of this case for the following reasons.

[20] In the letter dated 7 January 2016, MIB stated that 'The SC has queried on whether Deloitte Corporate Advisory has reviewed AGR-TRACS' reserve assessment report and revised asset valuation report to ensure full compliance with the requirement as set out in item (4), Part F, Appendix 10(b) of the Main Market Listing requirements of BURSA Malaysia Securities Bhd. It was mentioned during the SC discussions that the opinion set out in the fairness report should be, inter alia, without qualification and that Deloitte Corporate Advisory is satisfied with all information provided including assumptions made in the AGR Reports'.

[21] The minutes of the meeting held on 15 January 2016, prepared by SC and R2, inter alia, states the following:

(a) the objective of the meeting is 'To seek clarification from the SC on their request for the Update Fairness Report in the relation to submission of Application for QA ...';

(b) Deloitte specifically informed R1 that they were unable to 'update the Fairness Report by 22 January 2016 and had subsequently told CLIQ (R2) that they will not be updating the Fairness Report';

(c) 'JC (MIB) asked whether the SC could extend the submission deadline of 22 January 2016 to a later date as Deloitte had said that they are unable to update the Fairness Report by 22 January 2016 ...';

A (d) R1 was prepared to 'accept a 'negative assurance' in respect of the Fairness Report ...'; and

(e) states that by 'negative assurance', SC meant 'Deloitte can state in its Fairness Report that although they have relied on AGR's Reports, nothing has come to our attention that causes us to believe that the AGR's Reports are inaccurate'.

[22] Further, in a letter dated 15 January 2016, MIB informed R2 that in connection therewith, we wish to advise the Board of Directors of CLIQ, that at the meeting, SC has advised that the application is deemed incomplete in view of the information which has yet to be submitted to SC as we have already highlighted in the letters as follows:

(a) the updated AGR reports;

(b) the reply to SC's queries; and

(c) the updated revised fairness report.

[23] In the same letter, MIB further states that 'In addition, the SC also reiterated that the deadline to submit the abovementioned information remains as 22 January 2016'.

[24] I agreed with the submission of the learned counsel for the applicants that the email dated 20 January 2010 makes it clear that the meaning of 'negative assurance' discussed in the meeting held on 15 January 2016 is a requirement that Deloitte has to undertake an independent technical review of the AGR reports. The independent technical review by Deloitte over the reports of AGR surfaced for the first time in the letter dated 7 January 2016 from MIB, in the form of a query from SC whether Deloitte has undertaken such a review.

[25] Therefore, based on the facts of this case, in my view, there was a 'decision' by SC vide MIB's letter dated 7 January 2016 for Deloitte to produce an independent technical assessment of AGR's reports.

NO LOCUS STANDI

[26] It is SC's case that the applicants have no locus standi in this matter as they are not shareholders in R2 and therefore have no legal interest. In support of this contention, SC has relied on *Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan* [1987] 2 MLJ 346.

[27] SC further contends that in any case, a financial interest is not sufficient to establish locus standi. They relied on the case of *Kerajaan Negeri Selangor &*

Ors v Pendaftar Pertubuhan Malaysia and another suit [2012] 3 MLJ 795.

[28] However, in the decision in *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145, the Federal Court had reviewed the true test of locus standi in judicial review proceedings under O 53. The Federal Court held that the test propounded in *Government of Malaysia v Lim Kit Siang United Engineers (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12 and *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 is not applicable to an application for judicial review under O 53. The test is whether a person is 'adversely affected'. This is what the Federal Court said:

> In order for an applicant to pass the 'adversely affected' test, the applicant had to show he had a real and genuine interest in the subject matter which was different from the 'sufficient interest' test applied to English cases under the English Supreme Court Rules.

[29] Having rejected the test propounded in *Lim Kit Siang* that a legal right must be affected before there can be a standing in a judicial review, the Federal Court stated the test as follows:

> In our view, for an applicant to pass the 'adversely affected test', the applicant has to at least show he has a real and genuine interest in the subject matter. It is not necessary for the applicant to establish infringement of a private right or the suffering of special damage.

[30] In gist, the applicants have pleaded that SC's decision has had a severe impact on:

(a) the investments made by the public in R2 and the expectation of the investing public on the acquisition of the qualifying asset and thus the profits to be made;

(b) the value of the investment in terms of warrants held by members of the public which are now potentially reduced to zero;

(c) the diminution in the value of shares held by members of the public in R2 due to the return of 90% only of their investment upon liquidation (10% wasted costs to acquire the qualifying asset); and

(d) the wasted costs of the IPO and the effort to acquire the qualifying asset in terms of the investments made by private persons and the applicants.

[31] In the light of the above authorities and applying it to the facts of this present case, in my view, the applicants have the locus standi to bring this proceeding against SC on the ground that they have a direct financial interest as shareholders of Best Oracle, who in turn hold 20% of shares in R2.

A DOMESTIC REMEDY WAS NOT EXHAUSTED

[32] This brings me to the final issue in this case.

B **[33]** It was contended for SC that in essence, SC has argued that the appeal mechanism provided under s 364 of the Capital Markets and Services Act 2007 ('Act 671') has not been availed by the applicants.

C **[34]** On this point, it was submitted for the applicants that the applicants and R2 have availed themselves of an appeal to SC to reconsider its position with respect to (i) the 2P Reserves issues; and (ii) the requirement of Deloitte's independent technical assessment of AGR's reports based on the following grounds:

D (a) in an email dated 20 January 2016, R2 informed Deloitte, a copy of which was emailed to MIB, that a 'negative assurance' means that there was no requirement for Deloitte to undertake an independent technical assessment of AGR reports. MIB, in the email dated 20 January 2016, presents SC's position and states clearly the meaning of 'negative assurance'. SC effectively rejected the applicants' appeal to reconsider their decision made vide the letter dated 7 January 2016;

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(b) in an email from R1 dated 26 January 2016, SC responding to a letter dated 23 January 2016 and an email dated 25 January 2016 sent directly by the applicants to SC appealing, inter alia, for SC to accept the second application (14 December 2015 application) because there was difficulty, in a short period of time, for Deloitte to produce the independent technical report as requested by SC, stated that the applicants must communicate through their principal advisers, namely MIB. This was SC's second rejection of the applicants' appeal to reconsider the decision made vide letter dated 7 January 2016; and

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(c) in a letter dated 15 February 2016, R2 requested an extension of time of at least three months starting from 10 April 2016. However, in a letter dated 24 February 2016, SC responded by stating that the equity guidelines, investors expectations, R2's statement of accounts expiring on 31 March 2015, the auditor's report, and the 'regulatory certainty' all required R2 to complete the acquisition of the qualifying asset by 9 April 2016. This amounts to the third and final rejection of R2's request to SC for a reconsideration of the decision made vide letter dated 7 January 2016.

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[35] It is noted that s 364 of Act 671 provides as follows:

364 Application by aggrieved person for review

The Commission may review its own decision under this Act upon an application

made by any person who is aggrieved by such decision.

[36] Section 2 of Act 671 defines commission as follows:

> means the Securities Commission Malaysia established under the Securities Commission Malaysia Act 1993

[37] Section 3 of the Securities Commission Act 1993 ('Act 498') established the Commission. Section 4 of Act 498 provides that the membership of the commission are as follows:

> 4 Board of Commission
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> (1) There shall be a Board of the Commission.
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> (2) The Board shall consist of the following members who shall be appointed by the Minister:
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> (a) a Chairman;
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> (b) a Deputy Chief Executive; and
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> (c) seven other members, who may include persons representing the government and private sector.
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> (3) The Board shall —
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> (a) be responsible for monitoring the overall governance of the Commission;
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> (b) be responsible for reviewing and approving the strategic plan and budget of the Commission;
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> (c) be responsible for reviewing and adopting appropriate systems and controls to manage the enterprise risks of the Commission;
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> (d) have oversight of the affairs and business of the Commission and keep under constant review the performance of the Commission in giving effect to its objects, carrying out its functions and the use of the financial resources of the Commission; and
>
> (e) be responsible for such other matters as may be provided under the securities laws.

[38] Based on the facts of this case, I am satisfied that the appeal (review) mechanism under s 364 of Act 671 has not been availed by the applicants. In fact, the applicants have not provided any reason why it has not resorted to the statutory mechanism under s 364.

[39] The Court of Appeal in the case of *Mohd Karim bin Abas & Ors v Ketua Pengarah Jabatan Hal Ehwal Kesatuan Sekerja* [2013] 4 MLJ 420 held as follows:

> The court's themselves have placed various restrictions to control exodus of complaints against public bodies by busy bodies and alike, or where the complaint is premature or trivial or misconceived as in the instant case. The development of the law in this area of jurisprudence will clearly show that the goal post for obtaining the relief has often been molded from time to time and is not seen as a static concept. If judicial fetters are employed, it is only for the purpose of stopping busy bodies or premature claims, who ultimately cannot be given any form of relief and from disturbing the courts and the workings of the government and public bodies.

[40] In *Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd* [2002] 2 MLJ 707, the Court of Appeal held:

> If the respondent has any complaints, then it is required to be addressed on an application for judicial review. And the proper time at which this should be done is after the exhaustion of the statutory appellate procedure.

[41] In my view, based on the facts of that case, the proper time at which the applicants should seek to apply for judicial review is after the exhaustion of the statutory review procedure in pursuant to s 364 of Act 671.

CONCLUSION

[42] Based on the above reasons this application is dismissed.

Application dismissed.

Reported by Dzulqarnain Ab Fatar